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No. 89-1996 (2)

In The

Supreme Court of the United States

October Term, 1989

ESTELLA HAYNES ROBINSON, ADMINISTRATRIX OF THE ESTATE OF WILLIE ROBINSON, JR., AND THE REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF WILLIE ROBINSON, JR.; COMILLA PERKINS AS REPRESENTATIVE OF THE HEIRS AT LAW OF PATRICIA ANN PERKINS, DECEASED; DEBRA ANN JOHNSON, A MINOR, BY AND THROUGH JOHNNIE MAE JOHNSON, HER MOTHER AND NEXT FRIEND; AND DETRICK GRANBERRY, A MINOR, BY HIS FATHER AND NEXT FRIEND, ALONZO GRANBERRY, AS REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF SHALANDA GRANBERRY,

Petitioners,

v.

MTD PRODUCTS, INC., AND HENRY M. BUMP,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

This case arises out of a multi-car accident involving the petitioners' vehicles and the respondents' truck. The petitioners filed suit against Henry M. Bump, the driver of the truck, and his employer, MTD Products, alleging that the truck was negligently operated.[1] Jurisdiction was based on diversity of citizenship and, pursuant to *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the district court applied Mississippi law.

The accident in question occurred after a small white car attempted to pass Bump's truck on a bridge on a two-lane highway. (T. 306, 1206). Both the truck and the white car were northbound. (T. 306, 1206). There were also three cars proceeding southbound: the first driven by Dewey Dickens, the second driven by Willis C. Harris, and the third driven by Willie Robinson, Jr. (R.2 378, 208). Both Bump and Dickens slowed to allow the white car to re-enter Bump's lane. (T. 211, 217, 314).[2] Harris, the driver of the second southbound vehicle, braked in an attempt to avoid rear-ending Dickens, lost control of his car and struck the right side of the bridge. (T. 321, 1209). Harris' vehicle bounced off the bridge railing, crossed the center line, and struck the left front wheel of Bump's truck. (T. 324, 1125, 1209). After the collision with Harris, Bump's

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[1] The respondents are generally referred to collectively herein as "MTD." MTD Products has no parent company and has only wholly-owned subsidiaries. This statement is provided in compliance with Sup.Ct.R. 29.1.

[2] Although the Mississippi Highway Patrol attempted to identify the driver or owner of the white car, their attempts to do so were unsuccessful. (T. 469-70).

truck crossed the center line of the highway and struck the Robinson vehicle. (T. 325).

At trial, the petitioners and respondents each presented different theories as to why Bump's truck crossed the center line and hit the Robinson car. MTD presented evidence that the initial collision between Harris' vehicle and Bump's truck disabled the truck's steering mechanism, causing it to veer uncontrollably across the center line. (T. 1338-1341, 1527). The petitioners presented evidence that Bump was simply thrown from his seat by the force of the initial collision with Harris, leaving Bump unable to steer or brake the truck because he was no longer in the driver's seat.

Approximately two years before trial, the district court held a pretrial conference, and a pretrial order was entered approximately six months prior to trial.[3] The pretrial order stipulated that Bump's truck was equipped with seat belts and that Bump was not wearing his seat belt at the time of the accident. (App. 8). The summary of the ultimate facts prepared by the petitioners for the pretrial order contained the following statement:

> It appears that [Bump] either did not fully apply the brakes, fearing a jack-knife, or not wearing seat belts, was thrown out of position in the collision with the Harris automobile.
>
> . . . .

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[3] As discussed below, under Uniform Local Rule 10(g) the petitioners were entitled to move to amend the pretrial order at any time during these six months, or even during the trial itself. However, no such motion to amend was ever made.

> Mr. Bump was not wearing seat belts and hit his head on the roof, cutting it so that forty stitches were required, in one of the accidents.
>
> – (App. 5, 6).

MTD reserved the right to object on the basis of relevancy to the stipulation that Mr. Bump was not wearing his seat belt. MTD also reserved the right to explain this stipulation to the jury. (App. 8).

The pretrial order listed, *inter alia*, the following contested issue of fact:

> 1. Whether the sole proximate cause or a proximate contributing cause of the accident and resulting injuries and death of Plaintiffs Robinson, Perkins, Granberry, Johnson and Granberry was due to the negligence of Bump by (a) failing to keep a proper lookout to the rear; (b) operating his vehicle at an excessive speed under the circumstances then and there existing; (c) failing to maintain proper control; (d) failing to brake properly; (e) failing to yield one half of the roadways[.]
>
> – (App. 8).

There were no contested issues of law listed with regard to Bump and MTD, other than the question of whether Harris' negligence or that of the driver of the white car might operate as an independent superseding cause of the accident. (App. 9). The petitioners did not move to amend the pretrial order at any time prior to or during trial.

Before trial, MTD filed a motion in limine seeking, *inter alia*, to exclude the evidence that Bump was not wearing his safety belt. (App. to Pet. for Cert. 53-54).

MTD argued that this evidence was irrelevant under state law and cited Mississippi cases holding that failure to wear a seat belt does not constitute evidence of negligence. (*Id.*); *see, e.g., D. W. Boutwell Butane Co. v. Smith,* 244 So. 2d 11 (Miss. 1971).

In response, the petitioners cited 49 C.F.R. § 392.16, a federal regulation mandating that truck drivers wear seat belts. The petitioners argued that the federal regulation preempted state law and thus also preempted the Mississippi cases holding that evidence of failure to wear a seat belt is not admissible to prove negligence. The petitioners cited *Stong v. Freeman Truck Lines, Inc.,* 456 So. 2d 698 (Miss. 1984), a Mississippi case holding that the failure to comply with a federal regulation constitutes negligence per se if the injured party is a member of the class the regulation was designed to protect. *Stong,* 456 So. 2d at 707. At that time, however, the petitioners gave no indication that they intended to proceed on a theory that failure to wear a safety belt constituted negligence per se, and they produced no authority for the proposition that the regulation was designed for their benefit. Instead, they simply argued that the regulation rendered Bump's failure to wear a seat belt relevant to the issue of his control over the truck. The district judge did not rule on the motion in limine prior to trial. (App. 11-12).

At trial, the petitioners sought to introduce evidence that Bump was not wearing his seat belt. (App. 13-22). In response, MTD argued that any evidence of Bump's failure to wear his seat belt was not relevant. (App. 13-22). The petitioners contended that Bump's failure to wear his seat belt was relevant to his failure to maintain control of the truck — a contested fact issue specifically listed in the

pretrial order. (App. 16, 17-20). Although the petitioners cited *Stong* in support of their argument, they again failed to indicate in any way that they intended to rely on a negligence per se theory. (App. 13-22). They still presented no authority or proof to support the proposition that they were members of a class that the regulation was designed to protect.

The district court initially held irrelevant any evidence of Bump's failure to wear his seat belt, because there was no evidence before the court showing that Bump's failure to do so was related to his alleged failure to maintain control of the truck. (App. 20-22). After evidence that Bump might have been thrown from his seat during the collision with Harris was admitted, the district judge reconsidered his earlier ruling and allowed the petitioners to introduce evidence that Bump had not been wearing his seat belt. (App. to Pet. for Cert. 34, 35). The petitioners were also allowed to argue to the jury that this affected Bump's ability to control the truck. (App. to Pet. for Cert. 9 n.2, 34-38).

The petitioners later sought to use the evidence of Bump's failure to wear his seat belt as grounds for requesting a negligence per se instruction. (App. to Pet. for Cert. 29-36, 40-42). The district judge denied the requested instruction (App. to Pet. for Cert. 29-36), and gave two reasons for his ruling: (1) the issue of whether or not failure to wear a safety belt could constitute negligence per se was not preserved as an issue of law in the pretrial order; and (2) under Mississippi law, negligence per se was not applicable because the petitioners had not shown that the federal regulation in question was designed to benefit the general public, as opposed to the

truck driver. (App. to Pet. for Cert. 29-36). Even after the district court based its ruling partially on the petitioners' failure to preserve the negligence per se issue in the pretrial order, the petitioners did not move to amend that order as allowed by Uniform Local Rule 10(g). (App. 1).

The district court considered the negligence per se issue one last time during the charge conference. (App. to Pet. for Cert. 40-42). The judge again determined that a negligence per se instruction was inappropriate, reasoning that, on the evidence before the court, the regulation was for the benefit of the truck driver and not for the protection of the public. (App. to Pet. for Cert. 40-42).

At no time during trial did the petitioners present to the district court the regulatory history of the federal seat belt regulation. Even after the district court initially held that the regulation was for the benefit of the truck driver only, the petitioners never came forward with any authority refuting this finding. The only evidence presented to the district judge on this point was the regulation itself.

The jury returned its verdict by answering special interrogatories. (T. 2060-63). In response to a combined question asking both whether Bump was negligent and whether his negligence was a proximate cause of the petitioners' injuries, the jury replied "no." (T. 2061). The jurors determined that Harris was negligent and that his negligence was the proximate cause of the accident. (T. 2061). They returned substantial verdicts for the petitioners against Harris. (T. 2061-62).

The petitioners appealed the verdict in favor of MTD. On appeal, they contended, *inter alia*, that the district court erred in refusing their requested jury instruction on

negligence per se regarding seat belt use. (App. to Pet. for Cert. 6). The Fifth Circuit affirmed the district court's ruling, holding that the petitioners waived the negligence per se issue by failing to raise it as a contested issue of law in the pretrial order. (App. to Pet. for Cert. 7-9). The petitioners argued that the district judge ultimately rested his ruling solely on the ground that the regulation was for the benefit of the truck driver rather than the public, because the district judge did not mention the pretrial order the second time he considered the negligence per se issue. (App. to Pet. for Cert. 8). The Fifth Circuit determined, however, that there was no support in the record for any argument that the district judge reconsidered or withdrew his earlier ruling that this issue was waived through failure to preserve it in the pretrial order. (App. to Pet. for Cert. 8-9).

REASONS FOR DENYING CERTIORARI

I. THERE IS NO CONFLICT AMONG THE CIRCUITS IN CONSTRUCTION OF PRETRIAL ORDERS

The petitioners contend that there is a conflict among the circuits on the issue of whether pretrial orders should be broadly or narrowly construed. According to the petitioners, the Fifth Circuit Court of Appeals narrowly construes the issues presented in pretrial orders, while the First, Sixth, and Tenth Circuit Courts of Appeals favor a rule of broad construction. In fact, any difference between the standards applied by the various circuits appears to be primarily a matter of semantics.

Federal Rule of Civil Procedure 16(e) reads as follows:

> **(e) Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

The language of Rule 16 recognizes that a pretrial order "control[s] the subsequent course of the action unless [it is] modified." In its notes on the 1983 amendment to Rule 16(c), the advisory committee stated as follows:

> Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. *If counsel fail to identify an issue for the court, the right to have the issue tried is waived.* Although an order specifying the issues is intended to be binding, it may be amended at trial to avoid manifest injustice. See Rule 16(e). *However, the rule's effectiveness depends on the court employing its discretion sparingly.*

(emphasis added). Thus, the text and comments to Rule 16 itself recognize that issues not preserved at the pretrial conference and in the pretrial order are waived.

This rule is consistent with the functions served by the pretrial conference and the resulting order. One of the main functions of the pretrial conference procedure is to clarify the issues to be litigated. *Ely v. Reading Co.*, 424 F.2d 758, 762 (3rd Cir. 1970); *Walker v. West Coast Fast Freight*, 233 F.2d 939, 941 (9th Cir. 1956) (major purpose of pretrial order is to eliminate surprise by sharpening and simplifying the issues to be tried). "Unless pretrial orders are honored and enforced, the objectives of the pretrial

conference to simplify issues and avoid unnecessary proof by obtaining admissions of fact will be jeopardized if not entirely nullified." *United States v. First National Bank of Circle*, 652 F.2d 882, 886 (9th Cir. 1981); *see also Ely*, 424 F.2d at 762 (effectiveness of procedure is destroyed if counsel are permitted to change positions taken at pretrial).

Courts in all of the circuits routinely exclude evidence or issues at trial on the ground that they were not preserved in the pretrial order. *See, e.g., R. L. Clark Drilling Contractors, Inc. v. Schramm, Inc.*, 835 F.2d 1306, 1308 (10th Cir. 1987) (court properly excluded choice of law issue where it was not preserved in the pretrial order); *Erff v. Markhon Industries*, 781 F.2d 613, 616-618 (7th Cir. 1986) (issue properly excluded where not preserved in pretrial order); *Itel Capital Corporation v. Cups Coal Company*, 707 F.2d 1253, 1261 (11th Cir. 1983) (conspiracy claim properly excluded where pretrial order contained no mention of claim); *Colvin v. United States*, 549 F.2d 1338, 1340 (9th Cir. 1977) (evidence proffered to show that time and materials agreement was a sham was properly excluded where not preserved in pretrial order); *Labbee v. Roadway Express, Inc.*, 469 F.2d 169, 172 (8th Cir. 1972) (court properly excluded evidence that truck driver was fatigued because this was not one of the allegations of negligence in the pretrial order); *Ely*, 424 F.2d at 762-63 (court properly excluded evidence concerning train signals and excluded testimony of expert on same because not listed in pretrial order); *Moore v. Sylvania Electric Products*, 454 F.2d 81, 83-84 (3rd Cir. 1972) (court did not err in excluding issue of negligence per se where common law negligence was only issue preserved in pretrial

order); *Kline v. S. M. Flickinger Co.*, 314 F.2d 464, 466-67 (3rd Cir. 1963) (court properly excluded evidence of design defect where pretrial order only preserved issue of negligence); *Wiggins v. City of Philadelphia*, 331 F.2d 521, 526 (3rd Cir. 1964) (court properly excluded evidence of design defect where issue was not preserved in pretrial order); *Walker*, 233 F.2d at 942 (court properly excluded evidence of plaintiff's difficulties in childbirth because issue not adequately preserved in pretrial order); *Sartori v. United States*, 186 F.2d 679, 682 (10th Cir. 1950) (court properly excluded evidence of ineffective respirators when this was not one of grounds of negligence listed in pretrial order); *see also* cases collected in *Circle*, 652 F.2d at 886 n.5.[4]

Further, the universal rule is that a district judge's interpretation of a pretrial order is reviewed only for abuse of discretion. *Swift v. State Farm Mutual Automobile Insurance Company*, 796 F.2d 120, 122 (5th Cir. 1986); *Flannery v. Carroll*, 676 F.2d 126, 130 (5th Cir. 1982); *Rodrigues v. Ripley Industries, Inc.*, 507 F.2d 782, 787 (1st Cir. 1984); *Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 818 (10th Cir. 1979).

The petitioner specifically cites cases from the First, Sixth, and Tenth Circuits that state, usually in a general discussion of the applicable law, that pretrial orders should be broadly construed. *Howard v. Kerr Glass Manufacturing Co.*, 699 F.2d 330, 333 (6th Cir. 1983); *Geremia v.*

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[4] There are also cases from many circuits holding that the court may refuse to give a jury instruction on an issue that is not preserved in the pretrial order. *Glismann v. AT&T Technologies, Inc.*, 827 F.2d 262, 267 (8th Cir. 1987); *Derewecki v. Pennsylvania R.R. Co.*, 353 F.2d 436, 445 n.10 (3rd Cir. 1965); *Miller v. Brazel*, 300 F.2d 283, 287 (10th Cir. 1962).

First National Bank of Boston, 653 F.2d 1, 5 (1st Cir. 1981); *Trujillo*, 608 F.2d at 818; *Rodrigues*, 507 F.2d at 787.

None of these cases, given the abuse of discretion standard and the varying facts in each case, is inconsistent with the approach taken by other circuits and by the Fifth Circuit. *Rodrigues*, although stating that pretrial orders should be construed broadly, excluded evidence concerning a specific defect in a machine stating, "[y]et we cannot hold that the district court abused its discretion in ruling that plaintiff's murky pre-trial statement did not in the circumstances fairly apprise Ripley of the momentary contact claim." 507 F.2d at 787. *Geremia*, a First Circuit case, quoted the broad construction language from *Rodrigues*, but based its holding on the district court's failure to adopt the pretrial order: "because the memorandum here was never specifically adopted by the court, any purported preclusion of issues therein cannot be viewed as restricting the court's considerable discretion in this area." 653 F.2d at 5.

Howard involved a situation where a particular theory of recovery was not contained in the pleadings but was "unquestionably" covered in the pretrial order. The court found that, under these circumstances, the pretrial order should be viewed as superseding the pleadings in the case. 699 F.2d at 332-33. *Trujillo*, relied on extensively by the petitioners, specifically recognized that "[a] trial judge may . . . reject contentions not included in a proper pretrial order." 608 F.2d at 817. In addition, the Tenth Circuit has, in a number of cases, excluded issues or evidence that have not been preserved in a pretrial order. *See, e.g., Sartori*, 186 F.2d at 682.

Considering the varying and situation-specific nature of the issues involved in these cases, the varying degrees to which issues have been preserved in the individual pretrial orders involved, and the wide discretion accorded the district judge in determining whether issues are sufficiently preserved, it is not surprising that different cases involving interpretation of pretrial orders appear to employ varying levels of leniency. This apparent difference is, however, superficial. One, bottom-line rule is employed throughout each of the fact-specific cases from the various circuits, i.e., the principle embodied in Rule 16 itself that an issue not preserved in the pretrial order is waived.

This court has previously declined to review a case that presented the issue of exclusion of evidence on the ground that it was not preserved in the pretrial order. *Payne v. S. S. Nabob*, 302 F.2d 803 (3rd Cir.), *cert. denied*, 371 U.S. 870 (1962). This case presents no special or important issues regarding application of Rule 16 that would merit a grant of certiorari.

Even assuming, *arguendo*, that different circuits are applying different standards to interpretation of pretrial orders, the pretrial order in question here, even if broadly construed, did not preserve the issue of whether Bump's failure to wear his seat belt might constitute negligence per se. Seat belts were mentioned only three times in the entire pretrial order: twice in the petitioners' summary of facts and once in the stipulations. The federal regulation at issue here, 49 C.F.R. § 392.16, was not mentioned

anywhere in the pretrial order.[5] The doctrine of negligence per se was not mentioned anywhere in the pretrial order. Bump's failure to wear a seat belt was not listed in either the "contested issues of fact" or the "contested issues of law" section as an indication of Bump's alleged negligence.[6]

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[5] The petitioners note that the pretrial order did not mention the state statutes that set a maximum speed of 55 miles per hour and require a driver to remain on the right-hand side of the road. They contend that they treated the federal regulation the same way; thus, if the application of these other statutes was preserved, the application of the federal regulation was also preserved. The petitioners did not, however, argue that they were entitled to a negligence per se instruction based on Bump's alleged speed in excess of 55 miles per hour or on his undisputed failure to keep the truck on the right-hand side of the road. Had they attempted any such argument, the district court might well have held that these legal issues were not preserved by the pretrial order, either.

The evidence of Bump's failure to wear his seat belt was, in fact, treated in exactly the same manner as the evidence regarding speed and failure to remain on the right-hand side of the road. The petitioners were allowed to present their evidence on the seat belt question and argue that it affected Bump's control of the truck.

[6] In this sense, the district judge did apply a broad rule of construction in allowing failure to wear a seat belt to be introduced or argued at all. This is particularly true where the issues used by the petitioners for comparison — "excessive speed under the circumstances" and "failing to yield one half of the roadways" — were specifically detailed in the pretrial order as grounds for their negligence claims against MTD. (App. 8, excerpts from contested fact issues section of pretrial order at ¶ 1).

The mere mention of Bump's failure to wear his seat belt in the summary of ultimate facts and in the stipulations section of the pretrial order did not place either the court or MTD on notice that the petitioners intended to raise an issue of law regarding application of the doctrine of negligence per se.[7] Thus, even construing the pretrial order in this case broadly, the contested legal issue of negligence per se was not preserved.

Moreover, the petitioners never exercised their right under Uniform Local Rule 10(g) to move to amend the pretrial order to include the negligence per se issue, which right existed even as late as the moment at trial when the district court ruled that the issue was not contained in the pretrial order. (App. 1, Uniform Local Rule 10(g)).[8] Accordingly, it is questionable whether the

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[7] The petitioners cite to the trial transcript and argue that respondents "admitted" that the seat belt issue was not a surprise. MTD did anticipate, based on the petitioners' fact summary and request for a stipulation regarding seat belts, that petitioners would attempt to introduce evidence that Bump was not wearing his seat belt. MTD moved in limine to exclude this evidence, contending that it was irrelevant. The petitioners' current argument concerning the federal regulation, however, and application of negligence per se were nowhere presented in the pretrial order. MTD had no knowledge or notice that the petitioners intended to make this argument. When MTD's counsel responded "no" to the statement of petitioners' counsel that the seat belt issue was no surprise, MTD's counsel was obviously referring to the question of admission of evidence of Bump's failure to wear his seat belt — not to the negligence per se issue. (App. 13-14).

[8] Contrary to petitioners' contention, the time lapse between the pretrial conference, entry of the pretrial order, and

(Continued on following page)

petitioners took all necessary steps to preserve their first question for review.

II. THE PETITIONERS ARE BARRED FROM RAISING THE HISTORY OF THE FEDERAL SEAT BELT REGULATION BECAUSE THEY FAILED TO RAISE IT IN THE DISTRICT COURT

The petitioners contend that the regulatory history of 49 C.F.R. § 392.16 demonstrates that it was intended for the benefit of both the general public and truck drivers. Regardless of the merit of the petitioners' argument, which the respondents do not concede, the petitioners are barred from raising this regulatory history at this time, because they failed to present it to the district court.

Under Mississippi law, violation of a safety statute or regulation constitutes negligence per se only where (1) the plaintiff is a member of the class sought to be protected by the statute or regulation, and (2) the resultant harm is of the type sought to be prevented by the passage of the statute or regulation. *Haver v. Hinson*, 385 So. 2d 605, 608 (Miss. 1980). Mississippi has specifically held that, in order to be entitled to a negligence per se instruction, the plaintiff bears the burden of showing the trial court that he is part of the class of persons the statute was intended to protect and that the harm he suffered was of the kind that the statute was designed to prevent. *U-Haul Company v. White*, 232 So. 2d 705, 708 (Miss. 1970).

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the time of trial does not work in their favor on this point. *See Colvin v. United States*, 549 F.2d at 1340; *Payne v. S. S. Nabob*, 302 F.2d at 806.

The petitioners clearly did not meet this state-law burden. The only evidence they presented to the district court concerning the purpose of the federal regulation was the text of the regulation itself.[9] The district court's construction of the regulation, absent the informative regulatory history, was reasonable. The district court's allegedly erroneous ruling that violation of this particular federal regulation did not constitute negligence per se, if indeed erroneous, was merely the result of the petitioners' failure to carry their burden under state law. That failure was expressly noted by the district court. (App. 35).

In this context, it is clear that neither the district court nor the Fifth Circuit held, as the petitioners' second question for review suggests, that the regulation in question can never provide the basis for a negligence per se instruction under Mississippi law. This Court should not grant certiorari to correct any error caused by the petitioners' failure to discharge their burden of proof.

In addition, even assuming for the sake of the argument that an error was committed in failure to allow a negligence per se instruction under state law, that error was essentially a function of misapplication of Mississippi law. It does not present a federal question worthy of this Court's consideration.

Although Mississippi law provides that violation of a federal regulation may constitute negligence as a matter of law under certain specific circumstances, there is no

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[9] The petitioners first presented the regulatory history for consideration in their brief while this case was on appeal to the Fifth Circuit.

requirement, constitutional or otherwise, that Mississippi law so provide. Mississippi could as easily provide that violation of a statute or regulation never establishes negligence as a matter of law. No grant of certiorari from this Court is warranted based on the fact that the district court may have misapplied Mississippi's state law standards for determining when violation of a federal regulation establishes negligence as a matter of law.

CONCLUSION

Based on the foregoing, the respondents, MTD Products, Inc., and Henry M. Bump, respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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UNIFORM LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN AND SOUTHERN DISTRICTS OF MISSISSIPPI

* * *

RULE 10. PRETRIAL CONFERENCES AND PRETRIAL ORDERS

* * *

(g) Effect of Pretrial Order. The pretrial order shall control the subsequent course of the action unless modified by the Trial Judge at the trial or prior thereto, upon oral or written motion, to prevent manifest injustice.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ESTELLA HAYNES ROBINSON, ET AL — PLAINTIFFS

VS. — NO. DC 84-221-GD-0

HENRY M. BUMP, ET AL — DEFENDANTS

ALONZO GRANBERRY, Father and Next Friend of DETRICK GRANBERRY, A Minor — PLAINTIFF

VS. — NO. DC 84-224-NB-0

HENRY M. BUMP, ET AL — DEFENDANTS

COMILLA PERKINS, as Representative of the Heirs at Law of PATRICIA ANN PERKINS, Deceased — PLAINTIFF

VS. — NO. DC 84-227-NB-0

MTD PRODUCTS, INC., HENRY M. BUMP, and WILLIE C. HARRIS — DEFENDANTS

DEBRA ANN JOHNSON, A Minor, By and Through JOHNNIE MAE JOHNSON, Her Mother and Next Friend — PLAINTIFF

VS. — NO. DC 84-228-NB-0

MTD PRODUCTS, INC., HENRY M. BUMP, and WILLIE C. HARRIS — DEFENDANTS

ALONZO GRANBERRY, Father and Next Friend of DETRICK GRANBERRY, A Minor — PLAINTIFF

VS. — NO. DC 84-231-NB-0

MTD PRODUCTS, INC. and WILLIE HARRIS — DEFENDANTS

[EXCERPTS FROM PRETRIAL ORDER ENTERED AUGUST 5, 1987]

1. A pretrial conference was held in this matter on the 4th day of February, 1986, at 10:30 A.M. at the United States Courthouse at Clarksdale, Mississippi before United States Magistrate J. David Orlansky.

* * *

3. The pleadings are amended to conform with this pretrial order.

* * *

7. The following is a concise *summary* of the ultimate facts as claimed by:

a. All Plaintiffs: As to Liability:

On the night of November 2, 1984, Willie Robinson, Jr., was driving his automobile in a southerly direction on U.S. Highway 61, approximately five miles South of Walls, Mississippi. He was driving slowly and carefully, on the right hand side of the highway. Passengers in the Robinson automobile were: Debra Ann Johnson, Detrick Granberry, Patricia Ann Perkins, Shirley Granberry and Shalanda Granberry. Immediately preceding the automobile driven by Mr. Robinson was an automobile driven by Defendant, Willis Harris, also proceeding in a southerly direction. At the same time, Defendant, Henry Bump, was driving a tractor-trailer unit for Defendant, MTD Products, in a northerly direction along the highway.

Near such point there is a railroad overpass to the South and a bayou bridge North of the overpass. At or just beyond the crest of the overpass, an unidentified

automobile began to pass the truck, which was gaining speed going down the overpass headed North. An automobile driven in a southerly direction by Dewey Dickens was near the North end of the bridge approaching the truck and the passing car, ahead of the automobiles driven by Mr. Harris and Mr. Robinson, when he saw two sets of headlights running side by side, realized there was a problem and applied his brakes.

Mr. Bump, the driver of the MTD Products truck, failed to keep a proper lookout to the rear. Just before the truck entered the bridge, Mr. Bump saw the lights of the Dickens automobile dip, looked in his mirror and saw the passing car at his side. He had seen the passing car earlier, when the passing car was South of the four lanes portion of the highway, South of the overpass, traveling fast. He had seen it in the rearview mirror really gaining on his truck prior to reaching the South foot of the overpass. He says as he crested the overpass he saw two cars behind him. He never looked to his rear again until he was entering the bridge.

Mr. Bump was operating the truck too fast for conditions and in excess of the fifty-five miles per hour speed limit. Mr. Bump claims when he first applied his brakes as his rig was entering the bridge, he had his hand on the gear shift, going from ninth gear, which covers forty-five to fifty-six miles per hour, to the tenth, or last, gear. However, the evidence indicates that the speed of the truck was even greater. The speed of the truck before the brakes were applied has been determined by Dr. Thomas Talbot, an accident reconstruction expert, to be at least sixty-five miles per hour. The passing car was finally able

to pass the truck and re-enter the northbound lane, at or near the South end of the bridge.

Mr. Bump failed to have the truck under control. Mr. Dickens, who avoided the collision, stated that Mr. Bump was wrestling with the steering wheel, the trailer was bouncing and swaying, swerving twelve to eighteen inches towards Dickens, about to take flight and he was afraid the truck was going to jack-knife and strike his automobile. It appears that skid marks made by the trailer proceed toward the southbound lane before the point of impact between the tractor and the Harris automobile.

Mr. Harris failed to have his automobile under control. Mr. Harris, on seeing the Dickens automobile nearly stop ahead of him and the truck approaching and going out of control, slammed on his brakes. In slamming on his brakes, his automobile skidded or drifted to the left. The tractor of the truck and the Harris automobile collided to the East of the center line, near the middle of the bridge, according to a gouge mark located by Officer Bobby Reed. The Harris automobile was spun around and driven backwards into the bridge abutment.

Mr. Bump failed to slow or stop the truck safely. The only skid marks of the truck North of the place where the collision with the Harris automobile occurred are front wheel tractor brakes. Mr. Bump should have been able to apply his brakes and stop before the collision with the Robinson automobile, but was unable to do so. It appears that he either did not fully apply the brakes, fearing a jack-knife, or not wearing seat belts, was thrown out of position in the collision with the Harris automobile.

The MTD unit proceeded in the northbound lane for a distance, then crossed into the southbound lane of traffic, occupied by the Robinson automobile and continued to come forward on this side of the road, directly into the path of the Robinson vehicle and struck this automobile headon with great force. It then took the Robinson car with it and struck the bridge abutment, near the North end of the bridge, driving the Robinson automobile back along the guard rail pilings at the North end of the bridge and causing it to catch fire. The truck moved a distance of more than three hundred feet from the place where its brakes were first applied until it struck the Robinson automobile; it moved a distance of more than five hundred feet from the place where its brakes were applied until it finally came to rest.

Mr. Bump was not wearing seat belts and hit his head on the roof, cutting it so that forty stitches were required, in one of the collisions. The trailer brakes were adjusted by another company. Previous repairs for air leaks had been made.

Debra Ann Johnson and Detrick Granberry were seriously injured and Willie Robinson, Jr., Shirley Granberry, Patricia Ann Perkins and Shalanda Granberry were killed in the accident. Witnesses heard groans come from the Robinson automobile.

* * *

b. Defendants MTD and Henry Bump: As to Liability:

On November 2, 1984, at approximately 7:30 p.m., Defendant Henry Bump, an employee of Defendant MTD

Products, Inc., was driving a 1983 Ford Tractor, pulling a 42-foot Monon Trailer northbound on Highway 61 approximately five (5) milers [sic] South of Walls, Mississippi.

As Henry Bump approached the southern end of the flat bridge crossing Lake Cormorant, an unidentified "phantom car" attempted to pass Mr. Bump's tractor-trailer rig in the fact [sic] of an oncoming southbound vehicle owned by Dewey Dickens. Both Dewey Dickens and Henry Bump applied their brakes in an attempt to allow the "phantom car" re-entry into the northbound lane of traffic so as to avoid an accident. The "phantom car" thereafter cut back into the northbound lane of Highway 61 in front of Henry Bump's truck and continued North.

At approximately this same time, a second southbound vehicle owned and operated by Defendant Willis Harris, came upon the rear of the Dickens' vehicle which had slowed due to the "phantom car". In an effort to avoid colliding with the rear of the Dickens' vehicle, Defendant Harris applied his brakes, lost control of his car and veered into the northbound iane of traffic striking the left front wheel of Henry Bump's truck, turning the wheel in a northwesterly direction and disabling the steering gear of the truck.

After Henry Bump's truck passed by the LTD, the truck proceeded out of control into the southbound lane of traffic where it struck a Mercury Montego owned and operated by Willie Robinson.

Defendants MTD and Henry Bump deny that Henry Bump was negligent in any manner and state that this tragic accident resulted from the negligence of the driver of the "phantom car" or from the combined negligence of

the driver of the "phantom car" and the Co-Defendant Willis Harris.

* * *

8. The following facts are established by the pleadings or by stipulation or admission.

* * *

*49. Mr. Bump was not wearing seat belts.

* * *

9. The contested issues of fact are as follows:

1. Whether the sole proximate cause or a proximate contributing cause of the accident and resulting injuries and death of Plaintiffs Robinson, Perkins, Granberry, Johnson and Granberry was due to the negligence of Bump by (a) failing to keep a proper lookout to the rear; (b) operating his vehicle at an excessive speed under the circumstances then and there existing; (c) failing to maintain proper control; (d) failing to brake properly; (e) failing to yield one half of the roadways.

* * *

4. Whether the sole proximate cause or a proximate contributing cause of the accident and resulting injuries and death of Plaintiffs Robinson, Perkins, Granberry, Johnson and Granberry was due to the combined negligence of Bump, Harris and the operator of the unidentified vehicle.

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*Relevancy and admissibility are not admitted by MTD or Bump. MTD and Bump reserve the right to explain stipulation No. 49 to the jury. Objection is made on the basis of Rule 403.

5. Whether the sole proximate cause or a proximate contributing cause of the accident and resulting injuries and death of Plaintiffs Robinson, Perkins, Granberry, Johnson and Granberry was due to the combined negligence of Bump and Harris.

6. Whether the sole proximate cause or a proximate contributing cause of the accident and resulting injuries and death of Plaintiffs Robinson, Perkins, Granberry, Johnson and Granberry was due to the combined negligence of Bump and the operator of the unidentified vehicle.

* * *

8. If Defendant Bump was negligent in any manner (which is denied), then whether the negligence of the operator of the unidentified car and/or the negligence of Willis Harris, or the combined negligence of the operator of the unidentified vehicle and Willis Harris, was an independent superseding cause of the accident and resulting injuries and death of Plaintiffs so as to relieve Defendants MTD and Bump of liability. (Mixed question of law and of fact)

* * *

10. The contested issues of law are as follows:

See mixed questions of law and fact in No. 8 above.

* * *

17. This pretrial order has been formulated at a pretrial conference before the United States Magistrate, notice of which was duly served upon all parties, and at

which the parties attended as hereinabove shown. Reasonable opportunity has been afforded for corrections or additions prior to signing. This order will control the course of the trial, as provided by Rule 16, Federal Rules of Civil Procedure, and it may not be amended except by consent of the parties and the court, or by order of the court to prevent manifest injustice.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ESTELLA HAYNES ROBINSON, ADMINISTRATRIX OF THE ESTATE OF WILLIE ROBINSON, JR., ET AL
Plaintiffs
v.
HENRY M. BUMP and MTD PRODUCTS, INC., and WILLIS C. HARRIS

CIVIL ACTION NOS.
DC 84-221, -224, -227, -228
-231-D-O

[EXCERPTS FROM PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTIONS IN LIMINE]
(Filed Feb 1, 1988)

COMES NOW the Plaintiffs by and through counsel and makes the following responses to the Defendants Henry M. Bump and MTD's Motion In Limine. Plaintiffs respond as follows:

* * *

MR. BUMP'S FAILURE TO USE SEAT BELTS

1. The issue of seat belts is important concerning the issue of Henry M. Bump's control. It is clearly relevant under Federal Rule of Evidence 401. In the recent case of *Stong vs. Freeman Truck Line, Inc.*, 456 So.2d 698 (Miss. 1984), the Mississippi Supreme Court has held that Federal Highway Administration Regulations which apply to trucks moving in interstate commerce furnish the reasonable man standard for all persons who come within their scope. Title 49 of the Code of Federal Regulations at §392.16 provides: "A motor vehicle which has a

seat belt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself with the seat belt assembly." This regulation is a safety regulation of the Federal Highway Administration. It is undisputed that Henry M. Bump was driving the 18 wheel tractor/trailer in interstate commerce. Thus these Federal Highway Administration Regulations clearly apply to him, preempt state law, and in accordance with the above cited Mississippi decision furnish the standard of care to which he must adhere.

2. As noted above, the issue of the seat belt is relevant to Mr. Bump's control of the vehicle. As also noted above, there is a Federal Highway Administration Regulation which mandates the use of seat belts. Violation of this regulation by Henry M. Bump and his employer's policy concerning seat belts is relevant in that the Defendants claim that failure to wear seat belts does not establish negligence in this case.

* * *

[EXCERPTS FROM TRIAL TRANSCRIPT]

[269] * * *

MR. THOMPSON: [. . .] Your Honor, may we approach the bench, please? May counsel approach the bench?

THE COURT: Yes.

(At the bench.)

MR. THOMPSON: What we want to do here, Your Honor, and I decided to stop at this point, because I'm going to ask him about the equipment on his vehicle, and I wanted to ask him about this, mirrors, fuzz-busters, the seat belts, and whether it was installed, and then later on in his testimony ask him to say if — questions about whether he was thrown out and that sort of thing. I'm sure the matter of the governor will probably come up in this conversation also, Your Honor.

MR. DUNBAR: A lot of points to cover, Your Honor. Maybe we ought to take a recess and discuss that, because we'd like to be heard on it, too.

THE COURT: Don't you think probably the thing to do would be to take a proffer out of the jury's presence and let [270] me hear what the —

MR. DUNBAR: All right, sir. However you'd like to do it.

THE COURT: Well, we know he's going to testify that he has the fuzz-buster, the seat belts —

MR. THOMPSON: Mirrors.

THE COURT: — mirrors.

MR. BOSTICK: And a CB.

MR. THOMPSON: And a CB, for whatever that's worth. Lots of different equipment.

MR. DUNBAR: It's a matter for argument, Your Honor, as well as the fact — correct me if I'm wrong — I don't think these are issues in the pretrial order.

MR. THOMPSON: Well, it's certainly no surprise to anybody.

MR. DUNBAR: No.

MR. THOMPSON: You objected to the introduction of the fuzz-buster as a matter of not being relevant under the Rule 401. Objected to the use of the seat belts, too. I really don't —

THE COURT: All right. I tell you what, we may be able to — really, it appears to the Court that the evidence, the existence of the evidence, is pretty much stipulated to. It's just primarily argument whether or not it's relevant and admissible.

[271] MR. DUNBAR: That's really why I didn't think the proffer would be helpful.

THE COURT: Yes. Let's just let me excuse this jury.

MR. THOMPSON: Yes, sir.

(In open court.)

THE COURT: Ladies and gentlemen of the jury, as I told you at the outset, there will be times when the Court will have to take up certain matters out of your

presence. We have come to one of those junctures in the trial. I will at this time excuse the jury, ask that you go to the jury room, do not leave the jury room, and let the Court address certain matters out of your presence. Hopefully this will be momentarily and won't take that long a time.

(Jury out.)

THE COURT: Mr. Thompson, the Court —

MR. THOMPSON: Yes, sir.

THE COURT: — understands that at this point you are going into the matter of the equipment that was on the truck and tractor at the time, that there are certain objections made as to the relevancy of some of these items, and I will hear you at this time, please, sir.

MR. THOMPSON: Your Honor, if it please the Court, I have asked my associate, Walker Sims, to brief that. Do you have any problem with hearing his argument on that, sir?

THE COURT: No, sir.

[272] MR. SIMS: Do you have any special order that you'd like me to address the issues in?

THE COURT: No, sir. Let's just do it as expediently as you can.

MR. SIMS: Yes, sir.

The first issue I'd like to address is the issue of the relevance of the seat belts, and the point that we make on the relevance of the seat belts is that we have stated in the pretrial order that Mr. Bump may have been thrown from

his seat at the Harris collision, and that it's relevant as to his control following the Harris collision, whether he was in the seat or not, and that his wearing seat belts would have a bearing on the ability for him to be able to be thrown from his seat.

And we believe that the federal regulations governing truck drivers like Mr. Bump require that one wear seat belts and — could I approach the bench and give you copies of the regulations?

THE COURT: No, sir. I have it in my hand here. 49 CFR 392.16.

MR. SIMS: Yes, Your Honor.

THE COURT: Yes, sir.

MR. SIMS: And we believe that this federal law preempts any state law and furnishes the rule as to what a reasonable man should do in the circumstances of driving a truck, [273] and that we are entitled to have — we are entitled to show that Mr. Bump was not driving with his seat belt on and that he may well have been thrown out of his seat at the Harris collision, and that would be relevant on his negligence in not being buckled in and being thrown away from the wheel where he could not control the vehicle any longer.

THE COURT: Now, Mr. Dunbar, do you think it would expedite matters if we address each one of these issues separately?

MR. DUNBAR: However you'd like to do it, Your Honor.

THE COURT: Well, it might — I'll tell you, Mr. Dunbar, Mr. Thompson, Mr. Sims, the Court of course recognizes that the ICC regulations, the federal highway regulations, are appropriate to come before a jury if they are relevant to the case. Now, of course, you've got the case, the *Freeman Truck Line* case in Mississippi, and any number of cases where federal regulations concerning speed, the conduct of a truck driver in a foggy situation, or where there's ice on the road, and any number of things, but the Court here is confronted with a situation where speed and lack of control are the primary contentions or allegations on the part of the plaintiff against this defendant.

Now, the testimony that's before the Court at this point is to the effect that as the Bump truck met the Dickens vehicle on that bridge that Mr. Bump was wrestling with the [274] steering wheel, that he was in position to steer the vehicle, and also the testimony according to Mr. Dickens was to the effect that he was braking, that he had been braking the truck.

Now, my question is, how is it relevant in this case? How would it have changed things or made things different as to whether or not he was wearing a seat belt?

MR. SIMS: May I address that, Your Honor?

THE COURT: Yes, sir.

MR. SIMS: Mr. Bump has testified by deposition that he was thrown out of the seat in the second collision, the collision with the Robinson car; however, we intend to introduce testimony through Officer Bobby

Reed that Mr. Bump told Mr. Reed on a couple of occasions that he was thrown out of the seat on the first collision with the Harris car.

THE COURT: All right. That he was —

MR. SIMS: And that he was — and it's relevant on the issue of his being able to control the car after the Harris collision.

THE COURT: It's your position that the collision with the Harris car threw him from his seat, or from his position behind the steering wheel, and that that affected his ability to maintain control in the interim between the Harris collision and the Robinson collision?

MR. SIMS: We believe that there's evidence to [275] support that, yes, Your Honor.

THE COURT: Mr. Dunbar, I will hear from you on this seat belt issue.

MR. DUNBAR: Yes, sir. There are several objections, several reasons why we feel it's not admissible, Your Honor, besides the relevance concerns that you have. Number two, this is not an issue of fact or law, as I understand the pretrial order. But, thirdly, a person, in order to take advantage of the statute and claim that it's actionable, the statute or rule or regulation has to be enacted to benefit that class of persons, Your Honor.

A seat belt regulation is purely obviously for the benefit of the occupant of a vehicle. It's not designed to protect the public at large. It's not a regulation or statute, Your Honor, therefore, that strangers to the regulation can invoke as a regulation enacted for their benefit. That's the third reason we think it's not admissible.

Just one second.

(Mr. Dunbar and Mr. Henke conferred off the record.)

MR. DUNBAR: I don't believe in the pretrial order there's any issue of law or mixed law and fact. I don't think this is addressed at all as being bases of a cause of action, either.

MR. SIMS: Your Honor? Can I address that?

THE COURT: Yes, sir.

[276] MR. SIMS: In our statement of facts on page 5 of the final pretrial order, it says, "It appears that he either" — and this is at the middle of the page, third paragraph.

THE COURT: Wait just a minute. Page —

MR. SIMS: Page 5 of the pretrial order, Your Honor, third paragraph, and the last sentence.

THE COURT: All right.

MR. SIMS: "It appears that he either did not fully apply the brakes, fearing a jackknife, or not wearing seat belts, was thrown out of position in the collision with the Harris automobile."

THE COURT: Those are contentions of the plaintiffs. Now, let's turn over to, what is it, page 13?

"The contested issues of fact are as follows:"

MR. THOMPSON: Let me give this to you.

(Mr. Thompson and Mr. Sims conferred off the record.)

THE COURT: You say that the issue of failure to maintain proper control includes this failure to wear a seat belt?

MR. SIMS: Yes, Your Honor, that's our contention. It was one of the contested issues of fact whether Bump's negligence was the failure to keep a proper lookout to the rear, operating at excessive speed, failing to maintain proper control, or failure to maintain, or failure to brake [277] properly could be under both proper control and failure to brake properly.

THE COURT: Well, gentlemen, the fact that Mr. Bump's truck was equipped with seat belts and the fact that he was not wearing the seat belts on the occasion in question has been stipulated to.

MR. DUNBAR: That's right.

MR. HENKE: That's correct.

THE COURT: So, the Court is of the opinion that at this point in this trial, based on the evidence that is before this Court at this time, that there is no showing that the failure to wear a seat belt in any way contributed to Mr. Bump's failure to maintain his truck under proper control.

There's been no proof before the Court at this time as to anything that occurred after Mr. Dickens met and passed the Bump vehicle on the highway. Now, the Court accordingly rules that the seat belt issue is not relevant as to the defendant Bump's failure to maintain proper speed, proper lookout, and proper control at this point.

It may very well develop with other witnesses that it would become relevant.

MR. THOMPSON: Your Honor, may I say one thing?

THE COURT: Yes, sir.

MR. THOMPSON: That the expert witnesses in this case for the defendant, Drs. Arnold and Bass, have testified [278] by way of deposition two important things: One is after the collision between the MTD vehicle and the LTD Harris vehicle that there was no braking, no evidence of braking to the collision point with the Robinson vehicle.

THE COURT: Well —

MR. THOMPSON: Yes, Your Honor.

THE COURT: — won't those depositions ever come before this Court and jury?

MR. THOMPSON: Yes, sir, but I don't know if it would be too late at that point to ask the very man who we think maybe didn't have on his seat belts where he could not brake that vehicle from the LTD to the Robinson. They will also testify, they being the expert witnesses, that the steering mechanism from their inspection of the MTD vehicle was all still intact, metal to metal, from the steering wheel down through the steering mechanism to the tie rods to both wheels. And their allegations in that case that the steering mechanism was disabled or impaired is no longer in existence.

THE COURT: What does that have to do with a seat belt?

MR. THOMPSON: We want to know whether he was at the wheel with his hands on the wheel or

whether it could be true that he told Bobby Reed that he had gotten knocked off and was sitting over in the other seat.

[279] THE COURT: Well, you've got him on cross-examination here. You can ask him.

MR. THOMPSON: May I ask him that?

THE COURT: Just stay away from the seat belt. You can ask him anything about braking, steering, or proper control or anything else. The Court rules at this time that the federal regulation is not relevant to the issues in this case at this point. All right? Let's go to the next point.

* * *